

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
LEE PEPIN, OFFICER OF DESIGNS BY LEE, INC.	:	DETERMINATION
	:	DTA NO. 813006
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1986	:	
through August 31, 1989.	:	

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Petitioner, Lee Pepin, Officer of Designs By Lee, Inc., 129 Interlaken Road, Stamford, Connecticut 06903-5099, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1986 through August 31, 1989.

Pursuant to 20 NYCRR 3000.5(c)(1), the Division of Taxation brought a motion, dated February 6, 1995, for an order granting summary determination to the Division of Taxation on the basis that petitioner failed to file a request for a conciliation conference or a petition for a hearing within 90 days of the issuance of two notices of determination. The return date of the motion was March 10, 1995. Petitioner filed no papers in response to the Division's motion. The Division of Taxation appears by Terrence Boyle, Esq. (Christina L. Seifert, Esq., of counsel). Based upon the pleadings, the affidavits and other documents submitted by the Division of Taxation, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner's request for a conciliation conference was properly denied as not timely filed.

### FINDINGS OF FACT

On January 28, 1994, the Division of Taxation ("Division") received a Request for Conciliation Conference ("Request") filed on behalf of Designs By Lee, Inc., 129 Interlaken Road, Stamford, CT 06903-5099 (the "Corporation"). This Request was mailed by regular first class mail and bears a metered postmark dated January 26, 1994. The Request references Notice/Assessment numbers "L-006566009-5 and L-006566008-6" and lists the taxpayer identification number 06-0800455. The Request is signed by one Kevin Arnone, CPA, and was accompanied by a Power of Attorney under which the Corporation appointed Mr. Arnone (and others) as its representative with respect to notice/assessment numbers L-006566009 and L-006566008.

Notices of determination were not attached to the Request. However, a Warrant dated November 17, 1993 and listing the judgment debtor as Lee Pepin (the "individual") was attached to the Request, listing the following information:

Assessment ID	Period <u>Ending</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	Assessment Total
L-006566009-5	8/31/89	\$ 0.00	\$6,782.87	\$ 0.00	\$ 6,782.87
L-006566008-6	8/31/89	18,483.77	5,933.61	13,764.39	<u>38,181.77</u>
Total Amount Due					<del>\$44,964.64</del>

The dollar amounts as well as the assessment ID numbers on the warrant match the dollar amounts and assessment numbers listed as at issue on the Request. The Warrant is identified by warrant ID number E-006566008, which matches to one of the assessment numbers on the face of the warrant. Finally, two "Explanation and Instructions" sheets pertaining to tax warrants were attached to the Request. These sheets are identical in content and differ only in that one is addressed to Designs By Lee, Inc. and carries warrant ID number E004555077, while the other is addressed to Lee Pepin and carries warrant ID number E006566008 (consistent with the warrant, Power of Attorney and Request).

The Division's Bureau of Conciliation and Mediation Services ("BCMS") issued a Conciliation Order to Lee Pepin, Officer of Designs By Lee, Inc., dated April 1, 1994,

dismissing the Request on the basis that it was filed late, since "the notices were issued on April 2, 1990, but the request was not received until January 28, 1994, or in excess of 90 days". This Order lists the notice numbers in question as "L006566008" and "L006566009".

A petition was filed with the Division of Tax Appeals protesting assessment numbers L006566009-5 and L006566008-6, and alleging at Item "2" thereof that "[a] conciliation conference was incorrectly denied as written protest was originally made within 90 days of statutory notice." This petition, received on July 5, 1994, lists "Designs By Lee, Inc. and Lee Pepin" as the petitioner(s), and specifies the amount of tax at issue as \$25,312.59 (excluding penalty and interest). The petition did not include either a copy of the "written protest" mentioned in Item "2" thereof or copies of any notices of determination. However, a Consolidated Statement of Tax Liabilities dated April 5, 1993 and addressed to Designs By Lee, Inc., lists the following information:

<u>Tax Type</u>	<u>Assessment ID</u>	<u>Tax Period Ended</u>	<u>Tax Amount Assessed</u>	<u>(+)Interest Amount Assessed</u>	<u>(+)Penalty Amount Assessed</u>	<u>(-)Assessment Payments/ Credits</u>	<u>(=)Current Balance Due</u>
SALES	0.00	L-004555078-9	6,782.87	08/31/89	0.00	0.00	6,782.87
SALES	12,656.29	L-004555077-1	<u>33,961.56</u>	08/31/89	25,312.59	15,711.77	7,593.49
TOTAL							<del>\$42,744.43</del> <sup>1</sup>

In support of its motion for summary determination, the Division submitted an affidavit made by one Norman W. Ayers, a Program Manager in the Division's Sales Tax Field Audit Management Section. By his affidavit, Mr. Ayers describes the Division's general practice and procedure for preparing notices of determination and demands for payment of sales and use taxes for mailing. Attached in support of this affidavit is the Division's certified mail record

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This consolidated statement of tax liabilities, addressed to the corporation, matches to the warrant ID number on the Explanation and Instructions Sheet addressed to the corporation (see, Finding of Fact "3"), and also reflects on its face the \$25,312.59 tax amount listed as at issue in the petition (as opposed to the \$18,483.77 tax amount listed in the Request).

relevant to this case, (consisting of a PS Form 3877 and a Form AU-372.1 [front and back]). Also attached to Mr. Ayers's affidavit are copies of two notices of determination. These notices, carrying assessment numbers S900402212C and S900402213C, respectively, are each addressed to "Lee Pepin - Officer Designs by Lee Inc., 129 Interlaken Road, Stamford, CT 06903". Each such notice spans the period May 1, 1986 through August 31, 1989. The first notice assesses tax, penalty and interest, while the second assesses penalty (presumably omnibus penalty) only, as follows:

<u>Notice Number</u>	<u>Date</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total Amount Due</u>
S900402212C	4/2/90	\$25,312.59	\$5,731.57	\$4,174.89	\$35,219.05
S900402213C	4/2/90	0.00	6,782.87	0.00	6,782.87

Mr. Ayers's affidavit describes the regular procedure followed for creating notices of determination for subsequent issuance. More specifically, all such notices are to be sent by certified mail, and in connection therewith a certified mail record (PS Form 3877 and Form AU-372.1) is prepared listing those taxpayers to whom notices are to be mailed together with a certified control number for each separate notice or groups of notices issued. Mr. Ayers notes that the numbers in the rightmost column of the certified mail record represent the last three digits of the notice number(s) being mailed. Mr. Ayers explains that the names and addresses on the envelopes bearing the notices are verified against the certified mail record, and that a sequential certified control number is assigned to each envelope address. Finally, all of the envelopes/notices are picked up by Division mail room personnel for delivery to the U.S. Postal Service ("USPS"), after which a postmark stamped copy of the certified mail record together with completed attestations of mailing are returned for retention as a record of mailing in the regular course of business by the Division's Sales Tax Field Audit Management Section.

The PS Form 3877 accompanying the Ayers affidavit carries six sequential certified control numbers in its leftmost column, the second of which (No. P27163) lists Lee Pepin, Officer, Designs by Lee, Inc., 129 Interlaken Road, Stamford, CT 06903 as the addressee. Listed immediately to the right of this information (in the rightmost column containing entries)

are the numbers "212-3". These numbers correspond to the last three digits of the notice numbers on the notices of determination addressed to Lee Pepin. Finally, this PS Form 3877 bears the April 2, 1990 stamp of the Albany, New York, Roessleville branch of the USPS. The second part of the mailing record, Form AU-372.1, is dated April 2, 1990 and lists (on its front) the following information:

<u>Notice Number</u>	<u>Identification Number</u>	<u>Name</u>	<u>Total Amount</u>
S900402212C	060800455	Lee Pepin-Officer	\$35,219.05
S900402213C	060800455	Lee Pepin-Officer	\$ 6,782.87

In addition, the reverse side of said form contains signed and witnessed attestations as to the April 2, 1990 delivery of the notices listed on such form to the Division's mailroom, the sealing and stamping of the envelopes in which such notices were enclosed, and the subsequent delivery of such notices enclosed in their sealed postpaid envelopes to the USPS on April 2, 1990.

In further support of the mailing of the notices in question the Division offered an affidavit made by one Daniel B. Lafar, who is employed as a Principal Mail and Supply Clerk in the Division's mailroom. The Lafar affidavit explains the regular procedure in the mailroom to be that upon receipt of the notices, envelopes and certified mailing record by the Division's mailroom, a mailroom clerk verifies the names and certified mail numbers against the information in the certified mailing record. The clerk then weighs and seals the envelopes containing the notices, affixes postage and fees to the envelopes, and records such amounts on the certified mailing record. Thereafter, a mailroom employee delivers the envelopes and associated certified mailing record to the Roessleville Branch office of the USPS in Albany, New York, where a Postal Service employee affixes a dated postmark and/or his or her signature to the certified mailing record. The mailroom then returns the certified mailing record with its dated postmark to the originating office within the Division. Finally, the Division also submitted an affidavit made by one Charles Brennan, whose signature appears on the reverse side of Form AU 372.1 attesting to delivery of the documents listed thereon to the USPS. Mr. Brennan's affidavit confirms, after review of the certified mailing record, his delivery of an

item of certified mail addressed to Lee Pepin to the USPS on April 2, 1990.

### CONCLUSIONS OF LAW

A. Tax Law § 1147(a)(1) provides that:

"[a]ny notice authorized or required under the provisions of [Article 28] may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. A notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice."

B. A notice of determination issued under the authority of Tax Law § 1138(a)(1) shall finally and irrevocably fix the tax unless the person against whom the tax is assessed shall file a petition for a hearing with the Division of Tax Appeals within 90 days of the mailing of the notice (Tax Law §§ 1138[a][1]; 2008). In lieu of filing a petition with the Division of Tax Appeals in the first instance, a taxpayer also has the option of requesting a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (20 NYCRR 4000.3[a]). However, such a request, which effectively suspends the running of the 90-day limitations period for the filing of a petition, must itself be filed within the 90-day period for filing a petition (Tax Law § 170[3-a][a]; 20 NYCRR 4000.3[c]).

C. The Division's denial of petitioner's request for a conciliation conference and its basis for seeking summary determination herein is that the Request was not timely filed. Where the Division has denied a taxpayer a conciliation conference on the basis that the request was not timely filed, the Division is required to establish both the fact and date of mailing of the notice of determination (see, Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991). The proof required consists of evidence of a standard procedure for the issuance of such notices offered by one with personal knowledge of such procedures, and evidence that establishes that the procedure was followed in the particular case under consideration (see, Matter of Montesanto, Tax Appeals Tribunal, March 31, 1994; Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Novar TV & Air Conditioner Sales

& Serv., supra; see also, Matter of MacLean v. Procaccino, 53 AD2d 965, 386 NYS2d 111; Cataldo v. Commissioner, 60 TC 522, affd 499 F2d 550, 74-2 US Tax Cas ¶ 9533).

D. In this case, the Division introduced sufficient evidence to demonstrate that it has a standard procedure for the preparation and mailing of notices of determination by certified mail. That evidence consists of the affidavits of two Division employees with personal knowledge and experience of that procedure: Norman W. Ayers and Daniel LaFar. These affidavits generally describe the procedures used by the Division in each stage of the process from the generation of a notice of determination to its delivery to the United States Postal Service. They also describe the Division's method of preparing and maintaining the certified mail record which serves as the Division's permanent record of mailing of notices of determination by certified mail.

In addition, the Division has also established that the standard procedure for the mailing of notices of determination was followed in this case. The certified mail record lists petitioner's name and street address and references the assessment numbers of the notices issued to him. In turn, this information matches to such information as carried on the faces of the notices (see Finding of Fact "6", "7" and "8"). Furthermore the mailing record includes the described attestations as to handling and physical delivery of the notices to the USPS (see Finding of Fact "9"). Finally, the mailing record (PS Form 3877) bears an April 2, 1990 USPS postmark (see Finding of Fact "8"). In sum, the Division's evidence is sufficient to establish that the two notices of determination described in Finding of Fact "6", addressed to petitioner, were mailed by certified mail on April 2, 1990.

E. As detailed above, the Division has submitted sufficient evidence to establish that the notices of determination were properly mailed to petitioner on April 2, 1990. Under Tax Law § 1147(a)(1), evidence of proper mailing gives rise to a rebuttable presumption of receipt of the notices. In turn, petitioner has offered nothing which would serve to rebut such presumption of receipt. In fact, petitioner tacitly admits receipt of the notices by the claim at Item "2" of the petition that "a written protest was originally made within 90 days of statutory notice".

Petitioner, however, has offered no copy or other evidence of such written protest or of the facts surrounding its alleged filing. Moreover, there is no evidence of any specific protest having been made by Lee Pepin (the individual petitioner) prior to the petition challenging denial of the Request as received by the Division of Tax Appeals on July 5, 1994. In this regard, the only Request in the record was filed listing Designs By Lee, Inc. (the corporation) as the party protesting, with no listing of the individual. Given the correspondence as detailed somewhat extensively in Findings of Fact "1" through "5", it may well be that the initial challenge via a Request listing only the corporate taxpayer by name but referencing assessment numbers for the individual (Lee Pepin) represents less than careful drafting. In any event, the fact remains that such Request, even if construed to cover and include Lee Pepin (but see, Matter of Crispo, Tax Appeals Tribunal, April 13, 1995) was mailed to BCMS on January 26, 1994, a date nearly four years after the mailing of the notices. Thus there is no evidence of any timely challenge to the April 2, 1990 notices issued to Lee Pepin. Petitioner apparently elected not to respond to this motion for summary determination, and has thus presented no evidence to contest the factual assertions in the Ayers, LaFar and Brennan affidavits that the notices of determination, assessment numbers S900402212C and S900402213C, were mailed to petitioner by certified mail on April 2, 1990. Consequently, this fact may be deemed to be admitted (Kuehne & Nagel v. Baiden, 36 NY2d 539, 369 NYS2d 667; Whelan By Whelan v. GTE Sylvania, 182 AD2d 446, 582 NYS2d 170, 173). In turn, the bare allegation of timely response thereto per Item "2" of the petition is insufficient to establish such claim or to deny resolution of this matter by summary determination.

F. Summary determination is granted in favor of the Division, and the petition of Lee Pepin, Officer of Designs by Lee, Inc. is dismissed.

DATED: Troy, New York  
May 4, 1995

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE